No. 17642

In the

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK GREVEY, co-partners, d.b.a. DUKE CITY LUMBER COMPANY, and DUKE CITY LUMBER COMPANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT T. JENKINS and GEORGIA MAE JENKINS, general partners, and GEORGIA MAE JENKINS, Trustee for JAMES HENRY NAGEL, limited partner, d.b.a. NAGEL LUMBER & TIMBER COMPANY, a limited partnership, and NAGEL LUMBER & TIMBER COMPANY, a limited partnership,

Appellees.

Appeal from the United States District Court for the District of Arizona

Honorable JAMES A. WALSH, District Judge

Brief of Appellees

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Brief of Appellees

JURISDICTION

Appellees concur in appellants' statement of jurisdiction.

PREFATORY STATEMENT

Appellees respectfully beg to differ with the "capsule" appearing on page 1 of the Brief for Appellants. These statements are not merely an over-simplification of the issues involved; they in fact misstate the case. Damages were not awarded plaintiff-appellees "for defendant-appellants' refusal to sell them $250,000 worth of real property for $325,000.":

> "Mr. Enersen: I take it then, your Honor, this award is not made upon the basis of the customary rule for damages for breach of contract to sell real estate?
>
> "The Court: No. No, it is based on the proposition that there was an agreement, breach of an agreement to engage in a business, as to which profit could be anticipated with a reasonable certainty and the amount of the recovery would be the profit which could with reasonable certainty be anticipated to result had the contract not been breached, but had the parties performed." (R. 100-101)

As a matter of fact, real property is only slightly involved in the transaction.*

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*Exhibit 11 (R. 1441) enumerates the property acquired by defendants and the values allocated by defendants to each of the separate items thereof:

Sawmill	$176,970.00
Planing Mill	127,240.00
Shop	18,780.00
Lumber Shed	12,670.00
Dry Kiln	56,470.00
Office Building and Equipment	3,480.00
Bunkhouse	4,540.00
Carriers and Lift Trucks	59,550.00
Stacking Sticks, Foundations, Spacers and Roof Boards	80,000.00
Camp	5,000.00
Trucks, Trailers, Auto Patrols and Ford Pickup	97,500.00
LAND	7,800.00
Total	$650,000.00

STATEMENT OF THE CASE

This appeal is from a judgment awarding damages to plaintiffs-appellees for breach of contract by defendants-appellants. The law applied by the District Court is neither new nor controversial. Plaintiffs had the first right to buy a successful lumber manufacturing business in Winslow, Arizona and were seriously considering its purchase. Defendants wanted to buy it themselves and induced plaintiffs to give up their first right to buy in consideration of (1) an option to allow plaintiffs to purchase a half interest therein at any time prior to April 30, 1959, and (2) an option to purchase defendants' remaining half interest at the end of seven years.

On September 23, 1958 plaintiffs gave up their first right to buy; defendants completed the purchase on November 6, 1958; and on January 6, 1959 defendants refused to allow plaintiffs to exercise their option and acquire a half interest in the business. This breach resulted in the present action. The District Court, presiding without a jury, awarded damages for the loss of profits reasonably certain to have been earned by plaintiffs had the defendants not breached the first option. No damages were sought or allowed on account of the second option.

STATEMENT OF FACTS

Appellees controvert appellants' statement of the case and of the facts. It is inadequate and inaccurate. It fails to inform the Court of the facts upon which the District Court based its judgment.

The District Court made nineteen separately numbered Amended Findings of Fact,* four of which have one or more

*The references in this brief to the Amended Findings of Fact are thus: (Findings 3); to the Brief for Appellants, thus: (Br. 51); to the printed record, thus: (R. 101); and to the exhibits, thus: (Ex. A).

subdivisions (R. 183-196). Only three of the Findings are disputed* on the appeal: Nos. 11, 12(a) and 19.

Since the vast majority of the Findings are not disputed or challenged on this appeal we know of no better or more accurate and concise way to state the facts than to adopt and copy the Findings in our Statement of Facts. As to those which are not disputed or challenged, we merely copy them in haec verba; and as to those which are disputed or challenged, we copy them and cite in parentheses the pages in the Transcript of Record where evidence in support thereof may be found.

We omit the first five Findings which relate only to jurisdiction and the identity and capacity of the parties. The remaining Findings are as follows:

FINDING 6:

At all times herein mentioned plaintiffs were and they now are engaged in the operation of a business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public.

FINDING 7:

On and prior to September 20, 1958, the New Mexico Timber Company, a New Mexico corporation, the Arizona Timber Company, an Arizona corporation, and the Bernalillo Lumber Company, a partnership consisting of A. I. Kaplan and T. P. Gallagher, partners, owned and engaged in the business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal

*These Findings are not challenged separately and particularly, as required by Rule 18(d). The fact that they are disputed is revealed only by a search and study of the brief.

of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public. Said corporations and partnership collectively hereinafter will be referred to as the "Gallagher Companies" and said business enterprise, together with certain physical assets, easements, leases and timber contracts appurtenant thereto, hereinafter will be referred to as the "Gallagher Properties".

FINDING 8:

Prior to September 23, 1958 the Gallagher business operations and the plaintiff's business operations were substantially identical. Their timber sources, physical plants, costs of operation, quantity, quality and type of product were substantially the same.

FINDING 9:

For many years prior to September 20, 1958, plaintiffs and the Gallagher Companies had an agreement whereby, in the event either the plaintiffs or the Gallagher Companies offered for sale either of their respective above described business enterprises, the other party would have the right of first refusal to purchase the business enterprise so offered for sale. During 1958 and shortly prior to September 23, 1958, the Gallagher Companies did offer the Gallagher Properties for sale. Pursuant to said agreement plaintiffs and the Gallagher Companies were actively engaged in negotiations for the purchase of the Gallagher Properties.

FINDING 10:

On September 10, 1958 defendants commenced negotiations for the purchase of the Gallagher Properties. On that day T. P. Gallagher advised defendants that the Gallagher Companies had an existing oral reciprocal first refusal agreement with the plaintiffs and that any sale to defendants would be subject to plaintiffs' first refusal. Thereupon defendants contacted plaintiffs and ar-

ranged for a conference which was held in Winslow, Arizona, on September 20, 1958.

FINDING 11:

At this conference plaintiffs and defendants agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purpose of the Gallagher Properties (R. 296, 387); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 296, 388-389; Ex. 3); that in the event plaintiffs exercised their said option, then the business enterprise herein referred to as the Gallagher Properties thereafter would be jointly owned and operated by plaintiffs and defendants for the purpose and in the expectation of making a profit (R. 337, 1734, 1843-1844, 1846, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly-acquired mill under the terms and at the prices specified in the milling agreement received in evidence as plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918).

FINDING 12:

On September 22, 1958,* defendants prepared the document received in evidence as plaintiffs' Exhibit 3 which the parties signed on September 23, 1958 and reads as follows:

---

*On this same day, which was two days after the September 20 conference and agreement, Liberman talked by long distance telephone to A. I. Kaplan; and, in response to Liberman's inquiry, Kaplan confirmed that he "had given Tom Gallagher authority to give Mrs. Nagel priority in any sale of the Winslow plant." (R. 49-50).

"September 23, 1958

"Mrs. George H. Nagel
Nagel Lumber & Timber Company
Winslow, Arizona

"Dear Mrs. Nagel:

"It is our understanding that you have a 'first refusal agreement' with Arizona Timber Company to buy out their Plant at Winslow; and, if you turn down this option it is our understanding that we are second in line to buy the Plant.

"It is now mutually agreed that in case either of us (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel Family as the second party) will take-up the proposition made by Arizona Timber Company and buy out the Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

"This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.

"Very truly yours,

MAURICE LIBERMAN
Maurice Liberman

"Liberman Group
by: MAURICE LIBERMAN

"Nagel Family
By: ROBERT T. JENKINS

"ML:rb"

FINDING 12(a):

From the conversations and negotiations of the parties carried on at the meeting of September 20, 1958 and from the language of Exhibit 3 in evidence the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3, that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties (R. 1859-1860, 1923, 1932-1934); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 335-336, 388-389, 1855, 1858, 1926-1927; Ex. 3); that in the event plaintiffs exercised their said option the plaintiffs and defendants, in addition to operating the business would share equally the obligation to provide any capital necessary therefor, as well as share equally the profits and losses of the business (R. 330-332, 337-338, 437-439, 878, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918).

FINDING 13:

At the time of the execution of Exhibit 3 by plaintiffs and defendants the business enterprise herein referred to as the

Gallagher Properties was a going business earning and capable of earning substantial profits, which plaintiffs and defendants contemplated said business would continue to earn in the future.

FINDING 14:

On September 23, 1958, plaintiffs released the Gallagher Companies from their first refusal agreement and withdrew from further negotiations with the Gallagher Companies for the purchase of the Gallagher Properties.

FINDING 14(a):

Following protracted negotiations in New York between defendant Maurice Liberman and the owners of the Gallagher Properties an agreement for sale of said Properties was reached on October 16, 1958 at about 2:00 A.M. subject to final approval by both buyers and sellers at 11:00 A.M.

FINDING 14(b):

In the early morning hours of October 16, 1958 plaintiff Mabel J. Nagel received a phone call in Winslow from defendant Liberman in New York. He requested that plaintiffs release defendants from the option agreement and send him a telegram to that effect as soon as possible. She replied that she did not think she would do that but would check with plaintiff Robert T. Jenkins, and she did. At 8:29 A.M. Mrs. Nagel sent Liberman a telegram stating "Do not wish to release options at this time."

FINDING 14(c):

In a later phone call on October 16, 1958, Liberman told Mrs. Nagel the price of the plant and timber but did not reveal that the terms were credit rather than cash. He acknowledged receipt of the aforesaid telegram and asked Mrs. Nagel to come to New York. She replied that she could not come. Plaintiffs did not see or hear from defendants again until mid-November, 1958.

FINDING 14(d):

On October 17, 1958 a tentative draft of the purchase and sale agreement was executed by defendants and the Gallagher Companies.

FINDING 15:

On November 6, 1958, defendants and the Gallagher Companies entered into a written contract whereby the Gallagher Companies agreed to and did sell and the defendants agreed to and did purchase the Gallagher Properties.

FINDING 15(a):

In mid-November, 1958, Jenkins approached Liberman for the purpose of discussing defendants' purchase of the Gallagher Properties. Liberman stated that he would be in Winslow shortly and would get in touch with Jenkins but did not do so on account of illness.

FINDING 15(b):

On December 23, 1958 plaintiffs asked to see the contract for the purpose of deciding whether or not to exercise their option, but defendants refused to allow them to see a copy.

FINDING 16:

On January 6, 1959, plaintiffs for the first time learned the terms of defendants' aforesaid purchase, and on that day they advised defendants they elected to exercise their option to purchase said undivided one-half interest in the Gallagher Properties and offered to pay one-half of the purchase price. At the time of so electing the agreement of September 20, 1958 between plaintiffs and defendants was still in full force and effect, the defendants had not been released from their obligations thereunder,

and plaintiffs had done all things required of them by said agreement. Also, at the time of so electing, the plaintiffs were ready, able and willing to consummate the purchase of said one-half interest.

FINDING 17:

Defendants refused and ever since have refused to allow plaintiffs to exercise such option and acquire said undivided one-half interest.

FINDING 18:

Plaintiffs claim that defendants owed the Gallagher Companies timber (referred to in plaintiffs' Exhibit 9 as "owed by Duke City") from which there would have been a net lumber recovery of 21,217,000 board feet; and they further claim that they are entitled to share in the profits which said 21,217,000 board feet would have produced, computed on the same profit basis as the Gallagher Aztec and the Forest Service timber. The aforesaid timber was standing in the forest and there would have been a net lumber recovery therefrom to the parties of 21,217,000 board feet; it was not "owed by Duke City," but was owned by Duke City; and plaintiffs are entitled to share in the profits which it would have produced, computed on the same profit basis as the Duke City Aztec and not on the same profit basis as the Gallagher Aztec and the Forest Service timber.

FINDING 19:

The present value of one-half of the net profits reasonably certain to have been derived from the operation of the Gallagher Properties by plaintiffs and defendants is the sum of $429,883.40. If the parties had gone ahead pursuant to the agreement between them:

FINDING 19(a):

The Gallagher Properties would have been operated during the years 1959 to 1973 inclusive, at a joint profit to the parties of $3.00 per 1,000 board feet as to the Duke City Aztec and of $4.71 per 1,000 board feet as to the Gallagher Aztec and Forest Service timber (R. 196-200, 291-292, 391-392, 1846-1847, 1918; Ex. 9, 10, 11, 12 and 13).

FINDING 19(b):

There would have been a net lumber recovery to the parties of 71,880,000 board feet from the Duke City Aztec, as to which the parties would have derived a profit of $3.00 per 1,000 board feet which would have produced a joint profit to the parties of $215,640.00; and the share of plaintiffs therein would have been one-half of that sum, or $107,820.00 (R. 70; Ex. 9).

FINDING 19(c):

There would have been a net lumber recovery to the parties of 194,685,000 board feet from what the evidence refers to as Gallagher Aztec and Forest Service timber, as to which the parties reasonably could anticipate a profit of $4.71 per 1,000 board feet. This would have produced a joint profit to the parties of $916,966.35; and the share of plaintiffs therein would have been one-half of that sum, or $458,483.18 (R. 196-200; Ex. 9, 10, 11, 12 and 13).

FINDING 19(d):

Plaintiffs' share of the aforesaid net profits aggregates $566,303.18; the present value of this sum at the rate of 4% is $478,633.40 (R. 765-767).

FINDING 19(e):

The interest which plaintiffs would have been required to pay on the purchase price amounts to $48,750.00. The net damage, therefore, is $429,883.40 (Ex. 4).

FINDING 19(f):

The damages sustained by plaintiffs are computed as follows:

SCHEDULE SHOWING COMPUTATION BY COURT OF DAMAGES SUSTA

		PRODUCTION OF AVAILABLE TIMBER BY YEARS		50% OF PROJECTED PR BY YEARS DUKE CITY AZTEC @ $3.0 ALL OTHER TIMBER @ $4.	
1959	Duke City Aztec		15,320,000	$22,980.00	
	Existing Forest Service		14,680,000	34,571.40	
		30,000,000			$
1960	Duke City Aztec		15,000,000	22,500.00	
	Existing Forest Service		7,000,000	} 35,325.00	
	Future Forest Service		8,000,000	}	
		30,000,000			
1961	Duke City Aztec		19,830,000	29,745.00	
	Future Forest Service		10,170,000	23,950.35	
		30,000,000			
1962	Duke City Aztec		17,350,000	26,025.00	
	Future Forest Service		12,650,000	29,790.75	
		30,000,000			
1963	Duke City Aztec		4,380,000	6,570.00	
	Gallagher Aztec		13,545,000	} 60,335.10	
	Future Forest Service		12,075,000	}	
		30,000,000			
1964	Gallagher Aztec		3,975,000		
	Future Forest Service		12,075,000		
		16,050,000			
1965	Future Forest Service	12,075,000			
1966	Future Forest Service	12,075,000			
1967	Future Forest Service	12,075,000			
1968	Future Forest Service	12,075,000			
1969	Future Forest Service	10,443,000			
1970	Future Forest Service	10,443,000			
1971	Future Forest Service	10,443,000			
1972	Future Forest Service	10,443,000			
1973	Future Forest Service	10,443,000			
		266,565,000			$56

EXISTING TIMBER—NET LUMBER RECOVERY

DUKE CITY AZTEC	GALLAGHER AZTEC	FOREST SERVICE	TOTAL	
15,320,000	13,545,000	14,680,000		
15,000,000	3,975,000	7,000,000		
19,830,000				
17,350,000				
4,380,000				Total Dam
71,880,000	17,520,000	21,680,000	111,080,000	Reduced
				Minus Pres
				Compute

FUTURE TIMBER—NET LUMBER RECOVERY

			TOTA
Forest Service Contract to be awarded 5/31/60 and to be cut by 5/31/62	30,820,000		taine
Forest Service Contracts to be awarded and to be cut in years 1963 to 1973 inclusive	124,665,000	155,485,000	
TOTAL		266,565,000	

THE ISSUES INVOLVED

1. Does the evidence support the Finding and Conclusion that the parties made a contract?

2. Did the District Court correctly rule that loss of future profits is the proper measure of damages?

3. Does the evidence support the Finding of the District Court that the present value of the future profits reasonably certain to have been earned by plaintiffs is the sum of $429,883.40?

SUMMARY OF ARGUMENT

1. The parties entered into a valid, lawful contract whereby appellees were granted an option until April 30, 1959 to purchase from appellants an undivided one-half interest in the Gallagher Properties in the event of their acquisition by appellants. Appellants' contentions to the contrary are each without merit.

2. The measure of damages for breach of an option allowing a party to acquire an interest in a going business is the amount of future profits reasonably certain to be earned therefrom, where the prospective gains or profits were within the contemplation of the parties and an immediate and direct inducement to the contract.

3. The evidence supports the Finding of the District Court in applying the above measure of damages for the reason that future profits were within the contemplation of the parties and an immediate and direct inducement to the contract.

4. Appellants' argument that recovery for loss of profits is limited to the difference betwen $325,000 and one-half of the fair market value of the mill is without merit.

5. Where loss of profits is the proper measure of damages the evidence need only show with reasonable certainty what the profits would have been.

6. The District Court properly determined the amount of plaintiffs' damages by taking into consideration the existence of a market for lumber which will permit continued realization of profits; the availability of timber for manufacture into lumber; and then calculating the amount of net profit which would have been earned by appellees after deducting appellees' cost of performance.

7. Appellants' attack upon the method used by the District Court to compute damages is without merit. The District Court deducted Nagel's entire cost of performance. A net profit of $4.71 per thousand board feet is applicable even after production drops below 30 million board feet per year. The District Court properly took into consideration timber not actually under contract and properly projected the profits for a period of 15 years.

ARGUMENT

The questions raised on the appeal, with respect to both liability and damages, involve issues of fact which appellants claim are not sustained by the evidence. Under these circumstances appellants are required to demonstrate that there is no substantial evidence to support the challenged findings and to set forth in their brief all of the material evidence on the questions and not merely their own evidence.

I. The Issue on Liability.

A. THE CONTRACT AND ITS TERMS.

The District Court found and concluded that the parties entered into a valid, lawful contract (R. 195). This determination was based upon the evidence, particularly Findings 11 and 12(a). For convenience and clarity we here quote these Findings verbatim and cite in parentheses the pages in the Transcript of Record where evidence in support thereof may be found.

At this conference [September 20 in Winslow] plaintiffs and defendants agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties (R. 296, 387); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 296, 388-389; Ex. 3); that in the event plaintiffs exercised their said option, then the business enterprise herein referred to as the Gallagher Properties thereafter would be jointly owned and operated by plaintiffs and defendants for the purpose and in the expectation of making a profit (R. 337, 1734, 1843-1844, 1846, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly-acquired mill under the terms and at the prices specified in the milling agreement received in evidence as plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918) (Finding 11).

From the conversations and negotiations of the parties carried on at the meeting of September 20, 1958 and from the language of Exhibit 3 in evidence the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3 that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties (R. 1859-1860, 1923, 1932-

1934); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 335-336, 388-389, 1855, 1858, 1926-1927; Ex. 3); that in the event plaintiffs exercised their said option the plaintiffs and defendants, in addition to operating the business would share equally the obligation to provide any capital necessary therefor, as well as share equally the profits and losses of the business (R. 330-332, 337-338, 437-439, 878, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918) (Finding 12(a)).

The above findings contain all the necessary elements of a valid, lawful contract; and for breach thereof appellants are liable. As the Arizona Supreme Court in *Crunden-Martin Mfg. Co. v. Christy,* 22 Ariz. 254, 196 P. 454, 456, aptly stated:

> "* * * the rule of law, as well as ethics, is that a party will be held to that meaning which he knew the other party to the contract supposed his words to bear if his language may be understood in more senses than one. In other words, whatever is expected by one party to a contract and known to be so expected by the other is to be deemed a part or condition of the contract. * * *"

B. REPLY TO ARGUMENT ON LIABILITY.

Appellants' Contentions Summarized

Appellants' contentions that they are not liable for breach of contract are all aimed at one proposition: that there was no

lawful, binding contract entered into between the parties. In their Answer to Amended Complaint (R. 39), and during the trial of this action appellants acknowledged the existence of a contract,* but urged adoption of their version of its terms. The District Court refused to accept appellants' version. Since this involved the resolution of conflicting issues of fact, appellants' version of the contract is not involved upon appeal. They now contend that there was no contract at all.

It is interesting to note that appellants did not file a motion for a new trial as to all issues. They filed only a Motion for New Trial as to Damages Alone (R. 135). It also is noteworthy that no error is assigned with respect to rulings on evidence.

Appellants have totally failed to comply with Rule 18(d) of this Court which provides that "In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous." A reading of the argument concerning liability reveals that under Specifications 1 and 2 appellants attack the judgment of the District Court in six respects:

No agreement was reached on September 20 in Winslow.
The minds of the parties did not meet.
The Statute of Frauds precludes recovery.
The parol evidence rule was violated.
The contract was void for vagueness.
Nagel failed to accept entire offer.

1. Agreement Was Reached in Winslow on September 20 Concerning Purchase and Operation of Mill.

Specific Terms of Agreement

The conference took place in the Nagel office in Winslow on September 20, 1958. The only persons present were Maurice

*See excerpts from Liberman's testimony, infra, pages 20-22.

Liberman, Mrs. George H. Nagel and Robert T. Jenkins. The conference lasted some two or three hours (R. 278-280, 326). It did not just happen. Liberman called Mrs. Nagel by long distance and requested the appointment. He chartered a plane and flew there from Alburquerque (R. 379, 873).

Notwithstanding the contention made by appellants (Br. 10), *all parties* present testified that they did reach an agreement at the conference concerning the purchase and operation of the mill.

Robert Jenkins testified:

Nagel wanted the whole plant at the time Liberman suggested they buy it together (R. 382). Liberman said "* * * if we buy it together we will mill it all together, put it all in the mill" (R. 1918). He knew of Nagel's first refusal agreement and said "You have got to turn him down before I can make a deal with him"; Nagel was to refuse to buy it so Liberman would have a free rein to make a deal (R. 1923). Nagel would then tell Gallagher that it would not purchase the plant, Liberman then would purchase the plant if at all possible, when his deal was completed Nagel would have an option of purchasing in his deal on a fifty-fifty basis, at the end of seven years Liberman would sell to Nagel, however, Nagel had no obligation to buy the plant at the end of seven years nor to buy on a fifty-fifty basis (R. 388). Thus, Nagel had two options. Liberman also said that at the end of seven years "He would sell us his remaining half interest in the plant, if he purchased it and our original fifty-fifty deal was consummated" (R. 396, 1918); Liberman said Nagel could have "until April 30th to exercise this option to purchase into his deal" (R. 389, 449, 1926-1927). This date was suggested because until then Nagel's money would be tied up in logs and lumber inventories; its money would be more readily available by then; and Liberman readily agreed (R. 388-389). Liberman said that a

profit of $2 per thousand for milling his Aztec timber was too cheap, and he said "that $3 would be a reasonable amount" (R. 390). He also said "I have a contract for Three Dollars and I don't see why it should be changed" (R. 1918). He was speaking of his milling agreement with Gallagher under which his Aztec timber was being milled.

Mrs. Nagel testified:

Mr. Liberman said "Let's buy the mill together" (R. 282, 319, 1838). He asked Nagel to call Gallagher and tell him Nagel was not going to buy the mill (R. 296, 1840). He further stated: "I will buy the mill and I will give you an option agreement to buy one-half in the mill and the timber" (R. 296). He said Nagel could have until April 30, 1959 to "complete our purchase and buy in" (R. 283-284, 296).

The parties discussed the price of the mill and timber (R. 288) and the amount of Forest Service Timber and Aztec timber available (R. 289, 330). The timber would be owned fifty-fifty if the purchase was made (R. 331). Nagel would withdraw from the deal, Liberman would buy the plant and the timber, Nagel would have an option to buy in on a fifty-fifty basis at exactly the same terms and conditions of Liberman's purchase, and the option would remain in force until April 30, 1959 (R. 337-338). Jenkins would manage the mill (R. 287).

Liberman recognized that the parties reached an agreement on September 20, 1958. We quote him *verbatim*:

> "Q. You flew there, chartered a plane and flew there for that one purpose of seeing her, and that is all you did do on that trip, see her and Bob, have your discussion and reach an agreement, is that right?
>
> A. Yes (R. 1560).
>
> A. * * * we got to a conclusion, both parties, that the best thing was for us to buy the plant together (R. 1539).

Q. You made an agreement with Mrs. Nagel on September 20th about which you have testified?
A. Yes, sir (R. 1726).

Q. Well, you did reach an agreement there on that day?
A. That's right (R. 1550). See, also: 890-891.

Q. Didn't you tell us a while ago that you reached an agreement there that day?
A. Yes (R. 1571).

A. Well, we had an agreement, I had an agreement with Mrs. Nagel (R. 1598).

A. * * * I had an agreement with Mrs. Nagel, this was before I left (R. 1550).

Q. After these other discussions then did you agree to purchase the plant and timber together?
A. Yes, sir (R. 881).

Q. And the writing up was merely evidence of the agreement you reached at her office, was that right?
A. That's right.
Q. You already had your agreement when you left?
A. That's right.
Q. In fact, shook hands on it?
A. That's right.
Q. So you had your agreement when you left, and it was just a question of putting it down in writing afterwards, is that right?
A. That's right" (R. 1551).

In view of Liberman's admissions it is difficult to comprehend how appellants can seriously urge that no agreement was reached on September 20.

Liberman also testified with respect to Nagel's obligation under the agreement:

"Q. All right, the three of you, then, Mrs. Nagel and Bob Jenkins, in that conference in her office on September 20 agreed that Bob Jenkins would go and tell Gallagher

that the Nagel Company was not going to exercise its right of first refusal, is that right?

A. That's right.

Q. And it was agreed at that time that that would be done in order to pave the way for you to renew negotiations with Tom Gallagher, is that right?

A. To renew, yes" (R. 1554).

As to Liberman's next move, he testified as follows:

"Q. And what was said about when you would renew negotiations?

A. As Gallagher will permit, as soon as I could get hold of Gallagher.

Q. As soon as Bob Jenkins told Gallagher that the Nagel Company was giving up its right of first refusal, you were to go in and try to purchase the Gallagher Properties, is that right?

A. That I would go and try to see Gallagher.

Q. You just weren't going to see him, you were going to try to purchase the property, weren't you?

A. To get a proposal from him.

Q. And then it was the intention of everyone present that all three of you move as fast as you could, is that right?

A. Yes (R. 1554).

Q. Similarly, this question of Duke City buying it alone was completely behind you, and Duke City was not going to buy alone, that is right, isn't it?"

A. That is right" (R. 1568).

And, with respect to the April 30, 1959 option date, Liberman said:

"Q. (By Mr. Romley): Now, was there anything said in the September 20 meeting with regard to the option continuing beyond April 30?

A. No, sir.

Q. The only mention made with regard to the length of the time the option would continue was to April 30th of 1959, is that right?

A. Yes, sir" (R. 904).

Implied Terms of Agreement

Implied terms are as much a part of a contract as written ones. *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 95 P.2d 49. Even if the record were lacking in evidence with respect thereto, and it is not, the following terms would be implied in an agreement between two parties to purchase a going business on a fifty-fifty basis in the expectation of making a profit:

> that they would operate the business, and not shut it down or let it lie idle;
>
> that they would advance fifty-fifty the financing and necessary capital to operate the business;
>
> that they would provide management for the business;
>
> that they would pay reasonable salaries and expenses.

All parties spoke of Nagel's "fifty-fifty" option. The evidence shows what they meant by that term. Even if all that was said was that Nagel had an option to acquire a "fifty-fifty" interest in the purchase of a going concern, that would have been sufficient.

The basic rule of interpretation of contracts has been stated as follows, in *Chafin v. Main Island Creek Coal Co.* (1920) 85 W. Va. 459, 102 S.E. 291, 293, 11 A.L.R. 657:

> "* * * The object of construction of contracts is to give effect to the agreement of the parties, so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street. * * *"

In *Chafin* the court had before it the issue of the definiteness of the term "50-50": It held (102 S.E. at 293):

> "* * * That this expression has a well-defined meaning cannot be doubted. It conveys to the mind immediately the division of the subject of discussion into halves, and we are not willing to admit that we are so ignorant of terms in

common usage as not to know the meaning of this phrase. * * *"

In *Boyer v. Bowles* (1941), 310 Mass. 134, 37 N.E. 2d 489, 493, the court had before it the question of an agreement between two alleged partners to "go 50-50". In upholding the agreement the court stated:

> "* * * The importance of the agreement 'to go 50-50' cannot be overlooked. It is true that there is no reported fact that these words have acquired a fixed meaning in business transactions, but we think that it is good sense to understand the words as meaning the division into halves of something that was under discussion by the parties at the time. In our effort to give effect to the agreement of the parties, so far as it can be ascertained from the language used, it is not necessarily an insuperable obstacle that some part of the agreement may be expressed in the vernacular of the street. See Chafin v. Main Island Creek Coal Co., 85 W. Va. 459, 463, 102 S.E. 291, 11 A.L.R. 657, 661; Dunn v. Gilbert, 36 Wyo. 249, 256, 254 P. 121. We construe this expression, 'to go 50-50', to mean that the parties in question agreed that they were to be equally interested in the partnership business."

Although it is true that all details of the operation were not fully worked out, there can be no real doubt that both parties understood the agreement as being one of equal participation in the ownership, operation, costs, and profits or losses of the Gallagher mill. After gaining their desired consideration appellants cannot breach with impunity the mutually understood and accepted terms of the option agreement, simply because all of the details had not been worked out.

2. There Was a Meeting of Minds.

Plaintiffs and defendants testified to statements made in the course of the September 20 meeting. Each party testified that the

other expressly assented to the interpretation of the option agreement insisted upon by that party at the trial. The minds of the parties met upon one version or the other. The problem was resolved when the District Court determined that appellees told the truth and that their version was correct (Findings of Fact Nos. 11 and 12(a)).

Appellants' confusion may be due in part to their assumption that the District Court concluded that the agreement was made in Albuquerque and is contained in the September 23 letter. The agreement was entered into in Winslow on September 20. The letter is merely a memorandum or some evidence thereof; its purpose, as Jenkins testified, was merely to "commemorate" the agreement reached September 20 (R. 431).

The argument seems to be that the minds of the parties did not meet because appellees testified the option was to continue until April 30, 1959 whereas, appellants contend, as written and as intended by Liberman it would be "open forever" unless cancelled by mutual consent (Br. 16).

The exact language in question appears in the last paragraph of Exhibit 3 (R. 1423):

> "This option remains in force until ~~April 30, 1959, and will be automatically extended for six month periods unless~~ cancelled by mutual consent."

If it were intended that the option would be open forever, the words marked out below would not have been written:

> "This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.",

and the option would have read:

> "This option remains in force until cancelled by mutual consent."

An option which is not in perpetuity would not recite that it is for a term ending on a specified date; it would not recite that it would be "automatically extended"; and for certain it would not be automatically extended "for six month periods". It is patent that there is an ambiguity in the language Liberman used in the September 23 letter.

Appellants now argue there is no ambiguity. This was not their position in the District Court. At the pretrial conference when the court stated "to me there is some ambiguity about the agreement", counsel for appellants frankly said: "There is to all of us" (R. 233). At the trial the court, undoubtedly having in mind what counsel for appellants had acknowledged at the pretrial conference, said:

> "* * * I don't think there is any question that counsel will agree there were ambiguities in it, or matters that you just can't pick up by reading, and understand what the parties meant by the words they used." (R. 281)

No one intended an option in perpetuity, not even Liberman, the argument of his appellate counsel to the contrary notwithstanding.

James Cox testified with regard to a conference in Albuquerque on January 6, 1959 in the office of Liberman's Albuquerque attorney, in referring to the language used by Liberman in the "letter agreement" for periods after April 30:

> "And I said, 'Maurice, did you intend that this go on in perpetuity?' And he said, 'No, what I meant was that if either party wanted to cancel it, that they could cancel it' " (R. 1398).

Cox' testimony was denied neither by Liberman nor his Albuquerque attorney who was a witness at the trial. Appellants charge that Cox testified that "cancelled by mutual consent means cancelled by unilateral action, i.e., without mutual consent" (Br.

18). Cox did not so testify; he was quoting Liberman. Appellants' record citation does not bear them out.

The September 23 letter was prepared by Liberman before Jenkins arrived (R. 394). Jenkins and Dale Nelson, Nagel's comptroller, discussed it *in Liberman's presence* and said they did not see that it affected them or that there was anything that could "hurt" them (R. 1932-1933). It had already been signed by Liberman (R. 1933). Jenkins then testified:

> "Q. Did you have any discussion at all with Mr. Liberman about it that day in his office?
> A. About this agreement?
> Q. Yes.
> A. No, sir, just that in essence it was what we had agreed and that there was a change or two, but we didn't see that it affected us in any way, so we were willing to go ahead *in full confidence.*" (R. 1934)

Liberman knew or should have known that Nagel signed the letter in the belief that the oral agreement of September 20 still prevailed and was not affected by the letter in any material way. As Jenkins testified "We were willing to go ahead in full confidence."

3. Statute of Frauds Does Not Preclude Recovery.

Appellants contend that the September 23 letter does not constitute a sufficient memorandum in writing to satisfy the statute. An examination of the letter, however, makes it apparent there has been full compliance with the requirements of the statute. No exact formula exists to determine the degree of particularity with which the terms of the contract must be set out. *Restatement of Contracts,* Section 207, Comment (a). As pointed out in *Williston on Contracts,* Third Edition, Volume 4, Section 567A, page 22, it is not necessary for the memorandum to specify terms

which the law will imply or which may be inferred from the facts given.

Appellants performed or tendered performance of all their obligations under the agreement. In reliance upon the representations of Liberman, they relinquished their right of first refusal and, at the appropriate time, notified defendants that they elected to exercise their option. In *Condon v. Arizona Housing Corporation,* 63 Ariz. 125, 133, 160 P.2d 342, 346, the Court held:

> "The defendants cannot take advantage of their own wrong. The statute of frauds has no application when the agreement has been completely performed by the purchaser."

Underlying the rationale of this decision is the broader doctrine of equitable estoppel. It constitutes in this case another compelling reason why the statute of frauds is not applicable. As stated in *Waugh v. Lennard,* 69 Ariz. 214, 226-227, 211 P.2d 806, 814 (1949):

> "* * * It is universally conceded that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact that it is not in writing as required by the statute of frauds. As is often said, the statute of frauds may be rendered inoperative by an estoppel in pais. Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds. This is based upon the principle established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consumation of a fraudulent scheme. * * *"

Appellees gave up their right of first refusal as a part of the agreement with appellants. They informed Gallagher, as requested by Liberman, they no longer were interested in going ahead with

a purchase. It would be inequitable for defendants to now escape their obligation on the ground that it did not comply with the statute of frauds. Appellants are estopped from raising such a defense.

4. Parol Evidence Rule Is Not Applicable.

Appellants refer briefly to the parol evidence rule, arguing that parol evidence was not admissible (Br. 20). (In this regard it should be noted that appellants failed to specify error on the admission of such evidence.) The decisions of the Arizona Supreme Court make it clear that parol evidence may be considered in the situation here involved. In *Crone v. Amado,* 69 Ariz. 389, 397, 214 P.2d 518, 523, the basic rule is stated as follows:

> "Where the written language of an agreement is susceptible of more than one meaning the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning.
>
> * * * *
>
> "When ambiguities are present in a contract, its interpretation by the parties is most helpful, and practically all courts give heed to such practical interpretations. This court has long been committed to this rule. * * *"

Moreover, as this Court held in *Kingman Water Company v. United States* (CA 9, Ariz.), 253 F.2d 588, any ambiguity in an instrument will be resolved against the drafter thereof. Under this rule alone the District Court would have been justified in resolving the ambiguity against Liberman.

5. Contract Not Void for Vagueness.

We have referred to evidence supporting the findings that a valid, lawful contract was entered into, supra pages 16-17, including the specific and implied terms thereof, supra pages 18-24, and have shown that the minds of the parties did meet upon the

terms of the agreement found by the District Court, supra pages 24-27. Appellants concede that "an incredibly detailed oral agreement" was found by the District Court (Br. 5). There being ample evidence to support the findings concerning the terms of the agreement, it follows that the contract cannot be void for vagueness.

6. Nagel Did Not Fail to Accept Entire Offer.

It is urged that the option is invalid because Mrs. Nagel did not sign the September 24 letter regarding the seven-year agreement. This argument is without merit.

The option to purchase a one-half interest was agreed upon by both parties and the September 23 letter was signed before the September 24 letter was even written. The cases cited by appellants deal with situations where a party attempts to accept an offer in part and reject it in part. The reason Mrs. Nagel did not sign the September 24 letter was simply because it did not comply with the understanding reached by the parties regarding the seven-year agreement. The parties agreed that Nagel had an option to buy a one-half interest at any time prior to April 30, 1959; that they had a second option to buy the remaining one-half interest at the end of seven years (R. 396). Appellants have cited and can cite no authority on the proposition that Nagel's failure to sign the second option is fatal to its action.

Appellees have not based any claim in this action upon the seven-year agreement. Appellants apparently argue that Liberman can profit by his own failures and claim to be released from all of his agreements, because he failed to include the seven-year agreement in the September 23 letter and then failed accurately to set forth the agreement in the September 24 letter.

Joseph v. Donover Co. (CA 9, 1958), 261 F.2d 812, is cited extensively by appellants, beginning at page 12 of their brief. In

its true perspective, it does not support appellants' position on appeal. On the contrary, it supports appellees'. True, the trial judge in that case found that no contract was entered into by the parties and his judgment was affirmed. This is not to say that, had he found a contract to exist, this court would have reversed. The language of the opinion is so definite and explicit on some of the principles applicable to the case at bar that we beg leave to quote therefrom *in extenso:*

> "Appellee O'Donnell was the prevailing party below, and hence we must take that view of the evidence most favorable to him. He is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of his liability. If, when so viewed, there was substantial evidence to sustain the findings, then the judgment may not be reversed by this Court unless there is no evidence whatsoever to support the judgment; unless the clear weight of the evidence is against it; or, unless the trial court was influenced by an erroneous view of the law. * * *
>
> * * * *
>
> "If each of these conclusions of law is supported by findings of fact and the findings of fact are supported by the record, as appellee has attempted to point out carefully and in detail in his Appendix II; then, unless the clearly erroneous rule applies, or the trial court has employed the wrong legal principles, we must affirm." (261 F.2d at 817)
>
> * * * *
>
> "Granted that the trial judge *could* have agreed with Joseph's version of the transaction, the fact is that he did not. The trial court passed specifically on the credibility of witnesses telling opposing stories." (261 F.2d at 818)
>
> * * * *
>
> "Irrespective of the fact there was *conflicting* evidence, we point out that in this Circuit (as in others) the rule is that the trier of fact is at liberty within bounds of reason to reject entirely the uncontradicted testimony of a witness

which does not produce conviction in his mind of the witness' testimony. This would be particularly true when the testimony comes from an interested party rather than a disinterested witness. Or, the demeanor of the witness may be controlling rather than his actual words * * * 'the whole nexus of sense impressions' which one gets from a witness. * * *" (261 F.2d at 824)

This Court then concluded its opinion as follows:

"We fully agree with and follow the Supreme Court case cited and quoted by appellant, United States v. United States Gypsum Co., 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, that:

'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'

"This Court after a careful perusal of some 375 pages of Briefs and Appendices, most of the exhibits, and over 4,000 pages of transcript, is not left with the conviction, either definite or firm, or otherwise, that a mistake has been committed under the applicable Oregon and Washington law by the trial court in coming to the finding of fact which is decisive of this case—that no joint venture ever came into existence." (261 F.2d at 824)

Appellees respectfully submit that in the instant case, as in *Joseph v. Donover,* "This court after a careful perusal * * * of Briefs and Appendices, most of the exhibits, and * * * transcript" cannot be "left with the conviction, either definite or firm, or otherwise, that a mistake has been committed under the applicable * * * law by the trial court in coming to the finding of fact which is decisive in this case * * *"—that the parties did agree to the effect enumerated in the Findings. And that appellees, as a result,

were damaged in not less than the amount so carefully computed and specified in Finding No. 19.*

II. The Issue on Damages.

The issue raised by appellants on damages involves two questions:

Did the District Court apply the correct rule as to measure of damages and did the District Court correctly compute the amount of damages?

---

*Appellants assert that in *Joseph v. Donover Co.* this Court was presented "with a transaction almost identical to that presented here" and that "with only slight adjustment parts of that opinion would have served as a proper opinion of the District Court in this case" (Br. 12). This is not so.

In that case the parties had never met prior to their conference. Their alleged contract arose in a discussion in a bar while the men were drinking cocktails. The discussion was never reduced to writing. Neither of the parties knew anything about the property to be purchased. After the conversation in the bar five months elapsed before the parties again spoke or wrote to each other. It was twenty months after that before Joseph requested that the agreement be performed. (261 F.2d at 818-24)

In the case at bar the parties had known each other for years. (R. 1836-37, 374, 783) They had had many business dealings, either with each other or with other persons which threw them into mutual contact. (R. 783, 854-857) They both were intimately acquainted with the property; the Nagels owned the adjoining mill and had compared costs of the two mills on many occasions (R. 268-269, 398); Liberman had the use of 50% of the mill's production since 1956 (Ex. 5). The conference of the parties took place after express arrangements were made, knowing the mill was on the market (R. 874). Liberman chartered a plane and flew from Albuquerque to Winslow for the sole purpose of meeting with the Nagels (R. 873, 379). The meeting took place in Nagel's business office. (R. 380). The discussion lasted for approximately three hours, in which all phases of lumber manufacturing were thoroughly discussed (R. 381-384). It was concluded by a firm agreement (R. 386-389). This was reduced to writing three days later (R. 393). Immediately thereafter Nagel gave Liberman the consideration he sought; that is, Nagel withdrew from negotiations for purchase (R. 395). Except for a period when Liberman was ill, the parties were in constant contact until it became apparent that their dispute was unsolvable (R. 396, 401-404).

A. MEASURE OF DAMAGES.

1. Law Governing Measure of Damages.

The measure of damages for breach of an option allowing a party to acquire an interest in a going business is the amount of future profits reasonably certain to be earned therefrom, where the prospective gains or profits were within the contemplation of the parties and an immediate and direct inducement to the contract.

Martin v. LaFon (1940), 55 Ariz. 196, 100 P.2d 182;
Connecticut Ry. & Lighting Co. v. Palmer (CA 2 1940), 109 F.2d 568; aff. 311 U.S. 544, 61 Sup. Ct. 379, 85 L.Ed. 336;
Anvil Mining Co. v. Humble (1894), 153 U.S. 540, 14 Sup. Ct. 876, 38 L.Ed. 814.

2. Profits Were Within Contemplation of Parties.

Under the facts found by the District Court, loss of profits is the proper measure of damages. The testimony and conduct of each party and the circumstances surrounding formation of the contract support the Findings.

Liberman himself testified that his purpose in buying the mill was to operate it "as any normal lumber mill is operated for the purpose of manufacturing timber into lumber" (R. 945) and that he "didn't buy it to put it idle" (R. 945). Liberman also testified:

"Q. But this transaction at the time you entered into it, you expected, but couldn't predict definitely, would result in a profit to you and the Nagels, isn't that correct, sir?
A. Yes, sir.
Q. From the operation of the concern as a going business, isn't that correct, sir?
A. I don't know.
Q. But you expected it?
A. Yes, sir." (R. 1734)

Nagel's intention was to operate the mill for the purpose of earning profits and gaining position in the forest thereby enabling continuance of the profitable operation (R. 1865, 1921).

The parties intended to operate a going concern (R. 337-338, 945). They discussed mergers (R. 791, 1845-1846), working capital (R. 323, 790-791), management (R. 287, 332, 1919, 1928), and availability of future timber (R. 289, 330, 878). They agreed upon the profit the mill would receive from the manufacture of Liberman's Aztec timber (R. 291-292, 391-392, 1846-1847, 1918). The expressed and understood ultimate objective of each party was to operate the Winslow plant as a going concern for the purpose of making a profit (R. 945, 1734, 1854, 1861, 1921).

3. Reply to Argument on Measure of Damages.

Appellants' Contentions Summarized

Appellants' argument that the District Court applied the wrong measure of damages may be summarized as follows:

> Even if future profits are recoverable, the amount must be limited to the difference between $325,000 and one-half of the fair market value of the Duke City Winslow mill (Specification of Error No. 5; Br. 36).
>
> Profits were not within the contemplation of the parties as an immediate inducement to the contract (Specification of Error No. 7; Br. 43).
>
> The transaction should be considered as merely a sale of real estate (Specification of Error Nos. 3 and 4; Br. 32, 33).

(a) FUTURE PROFITS NOT LIMITED TO DIFFERENCE BETWEEN PURCHASE PRICE AND MARKET VALUE.

Appellants contend that under no circumstances and no matter how strongly the evidence supports a finding that the present

value of the profits reasonably certain to have been earned by Nagel is the sum of $429,883.40, nevertheless damages cannot be awarded in excess of the difference between $325,000 and one-half of the market value of the Duke City Winslow Mill (Br. 36-41).

Appellants have cited not one single case or other authority to support this wholly illogical theory. *Martin v. LaFon,* supra, is directly to the contrary. There, the cost of performance (purchase price) was $5,000. Martin's complaint prayed damages of $30,000 for loss of profits. His offer of proof as to loss of future profits in the operation of a going business (a hotel) was rejected by the trial court. The Arizona Supreme Court reversed and held (100 P.2d at 184):

> "We think this evidence was relevant and material to the issue and should have been admitted, and if from such evidence it appeared that the business had made a net profit, it would have sustained, and, indeed, required a judgment for plaintiff for a loss of future profits, in the absence of evidence indicating that in the future they probably would not have continued. * * *"

The Court recognized that a recovery of five times the purchase price for loss of profits would be proper. Under this rule, market value is not material.

The case probably most frequently cited on the question of loss of profits is *Anvil Mining Co. v. Humble,* supra. This case recognizes that the true measure of damages is loss of profit.

(b) PROFITS WERE CONTEMPLATED.

We have set forth, supra pages 34-35, the evidence which establishes that profits were within the contemplation of the parties as an immediate inducement to the contract.

Appellants argue that, because Nagel was interested in acquiring a "position" and because Duke City was interested in having

its Aztec timber milled, the Court erred in finding that profits were within the contemplation of the parties as an inducement to the bargain (Br. 46-54). They fail to comprehend the meaning of "position". This term denotes the acquiring of a status with the Forest Service whereby it will make available a continuing supply of government-owned timber at times and in amounts required by the particular operator. "Position" is acquired by owning and *operating* a mill supplied by Forest Service timber (R. 397-399, 470-471, 1864-1865, 1921). How could this purchase afford Nagel position with the Forest Service unless the plant was operated as a going concern cutting Forest Service timber? For what ultimate purpose is position sought by any lumber operator? Obviously, as with any business concern, for the purpose of making a profit.

Furthermore, was Duke City's primary purpose really the milling of its Aztec timber? Duke City already had a contract with Gallagher to mill all of its Aztec (Ex. 5). Liberman acknowledged that Duke City intended to bid for more Forest Service timber for the Winslow plant from the Sitgreaves National Forest (R. 879-880). Was not Liberman's real purpose to expand his lumber operations?

In *Martin v. LaFon,* supra, the Arizona Supreme Court aptly said (100 P.2d at 183):

> "* * * The real subject of the option was a going hotel and restaurant business, which had been operated by defendant for about a year and a half, and previously had been operated by plaintiff for some two years. The physical property covered by the lease was practically useless except for the purpose of running the business. It is apparent to us the record shows the parties must have known the only reason why plaintiff desired the assignment of the lease was so he could continue the operation of that particular business on that particular site, for the purpose of making a profit by its operation, and considered that as the inducement for the option. On this state of the record, we think the trial court

erred in striking from the complaint the allegations of special damages by a loss of future profits. * * *"

Susi v. Simonds (1951), 147 Me. 189, 85 A.2d 178, where neither party to the contract apparently had any idea as to the intended use of the property, and *Hardinger v. Till* (1939), 1 Wash. 2d 335, 96 P.2d 262, involving a newspaper ad for "someone wanting a home and income", are distinguishable simply upon the excerpts appearing therefrom in appellants' brief (Br. 52-53).

(c) MEASURE OF DAMAGES FOR SALE OF REAL ESTATE INAPPLICABLE.

Appellants devote many pages to a continuation of the argument presented in the District Court that the transaction should be construed as a contract for the sale of real estate (Br. 32-36, 43-54). They cite several cases involving the purchase and sale of real property, most of which deal with transactions involving the purchase and sale of residences (Br. 33-34, 52-53). The language of the District Court, supra page 2, makes it apparent that these cases are not applicable.

The acquisition of realty in the purchase of an established business is only one of the elements involved. Often, land values are of little significance. In this case only a fraction of the $650,000 purchase price represented land value and was but a part of the total consideration. The timber contracts and machinery, fixtures, motor vehicles and other equipment were also involved, as were working capital, plant replacements, etc. (see footnote, supra page 2). The District Court correctly refused to treat the transaction merely as a sale of real estate.

Appellants' Specification of Error No. 3 asserts that the damages were "grossly excessive". This argument is based entirely upon the "real estate theory" (Br. 32).

Appellants' Specifications of Error 3, 4, 5 and 7 and the lengthy argument thereunder reduce themselves to one propo-

sition: damages in the form of future profits may be awarded only if bargained for (Br. 53). The court found they were bargained for. Ample evidence supports this finding.

B. COMPUTATION OF DAMAGES.

1. Law Governing Proof of Future Profits.

The principle of law governing the sufficiency of proof of future profits may be simply stated: does the evidence show with reasonable certainty what the profits would have been? *Martin v. LaFon* (1940), 55 Ariz. 196, 100 P.2d 182.

The fact of damage through defendants' breach having been established, a liberal rule is applied in determining the amount of such damages. Inability to calculate damages with absolute exactness does not render the amount too uncertain for recovery. The modern rule makes it clear that difficulty in ascertaining the amount of damages is no longer confused with the right of recovery. Recovery of future profits is allowed if a rational and reasonable basis of computation is afforded, although the amount be only approximate.

Jacob v. Miner (1948), 67 Ariz. 109, 191 P.2d 734;
Martin v. LaFon (supra);
Connecticut Ry. & Lighting Co. v. Palmer (CA 2 1940), 109 F.2d 568; aff. 311 U.S. 544, 61 Sup. Ct. 379, 85 L.Ed 336;
Shannon v. Shaffer Oil & Refining Co. (CA 10 1931), 51 F.2d 878;
Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc. (CA 7 1934), 73 F.2d 725;
Julian Petroleum Corporation v. Courtney Petroleum Co. (CA 9 1927), 22 F.2d 360.

No fixed and definite rule exists for determining in every case what facts are to be considered in determining future profits.

The sufficiency of the evidence must rest within the discretion of the trial court based upon the facts of the particular case.

Connecticut Ry. & Lighting Co. v. Palmer, supra;
Hawkinson v. Johnston (CA 8 1941), 122 F.2d 724, cert. denied, 314 U.S. 694, 62 Sup. Ct. 365, 86 L. Ed. 555.

One of the most common methods of establishing future profits is through the use of records showing profits earned in the past.

Martin v. LaFon, supra;
Connecticut Ry. & Lighting Co. v. Palmer, supra.

The opinions of experts may be received and considered on the question of future profits.

Sheldon v. Metro-Goldwyn Pictures Corporation (1940), 309 U.S. 390, 60 Sup. Ct. 681, 84 L.Ed. 825;
Connecticut Ry. & Lighting Co. v. Palmer, supra;
Julian Petroleum Corporation v. Courtney Petroleum Co., supra;
Universal Pictures Co., Inc. v. Harold Lloyd Corporation (CA 9 1947), 162 F.2d 354;
McCormick on Damages, Sec. 29, p. 109.

The kind and the amount of evidence that will be held to afford a sufficient basis for estimation of loss of future profits varies greatly in different kinds of cases. Doubts are generally resolved against the party committing the breach of contract. *Restatement of Contracts,* Section 331, Comment c, p. 517.

2. Method of Calculation.

Computation Summarized

The District Court's award of damages for loss of profits was computed by finding the following basic elements from the evidence (Finding 19; R. 196-200):

Existence of a market for lumber which will permit continued realization of profits;

Availability of timber for manufacture into lumber;

Calculation of amount of net profit per thousand board feet of lumber which would have been earned by Nagel after deducting its cost of performance;

Determination of amount of net profit which would have been earned by Nagel in each year and reduction thereof to present value.

The District Court determined that a market will exist for the lumber produced by the Duke City Winslow mill at prices which will permit continued realization of profits through 1973; that during this period a supply of timber will be available which will result in a net lumber recovery of 266,565,000 board feet; that, after fully taking into consideration the cost of performance, the profit per thousand would have been $3.00 per thousand board feet on 71,880,000 board feet (denominated Duke City Aztec) and $4.71 per thousand board feet on the balance of 194,685,000 feet (denominated Forest Service timber and Gallagher Aztec); that this lumber would have been manufactured and sold and profits realized thereon in each year through 1973 in the amounts reflected in Finding 19(f); that the present value of Nagel's half of the total profits is $478,633.40; that the present value of the interest which Nagel would have paid on the purchase price is $48,750.00; and that the net damages sustained by Nagel total $429,883.40.

(a) EXISTENCE OF MARKET.

Kenneth Smith, an economic consultant, testified as an expert. His experience throughout a career in the lumber industry dating back to 1912 has given him a thorough knowledge of all phases of the lumber business (R. 629-635).

His testimony establishes with reasonable certainty the existence of a market for the lumber which will be produced by the Duke City Winslow mill at a profit at least comparable to that received now and for several years past (R. 646).

Appellants have not challenged Smith's qualifications or his testimony regarding market conditions; in fact, his testimony is completely ignored. For this reason, no extensive review of this phase of the damage question is necessary.

Summarizing this point briefly, Smith stated that there is "every anticipation that there will be a market for lumber in excess of the ability of the industry to supply lumber"; that there will be "a considerably greater demand for lumber by 1973 than there is today or was in 1952." His opinion was reached after studies as to "the position of Arizona in the lumber supply business and its prospect for market for Arizona timber" (R. 642-643).

The economic background against which the picture of future profits must be viewed is that there is going to be the opportunity —based upon limitation of supply as opposed to increase in demand—to make as much or more profit in the future from the operation of the Duke City Winslow mill as has been made by Nagel and the Arizona Timber Company in the past several years (R. 645-646).

(b) AVAILABILITY OF TIMBER.

Exhibit 9 sets out the sources and amounts of timber available for manufacture at the time of purchase and reasonably certain to be available in the future. The evidence is briefly summarized as follows:

(1) *Timber under Contract by Gallagher at Time of Purchase.* Appellants' purchase included Aztec timber owned by Gallagher (denominated Gallagher Aztec Timber) capable

of producing 17,520,000 board feet of lumber, and Forest Service timber under existing contracts capable of producing 21,680,000 board feet of lumber, based on an overrun of 15% on net log scale* (R. 70; Ex. 9).

(2) *Duke City Aztec.* The District Court found that the Aztec timber already owned by Duke City at the time of the purchase of the Winslow mill would be manufactured by Duke City and Nagel in the Winslow mill (R. 291-292, 391-392, 1846-1847, 1918). The amount of Duke City's Aztec timber at the time of purchase was 62,505,000 board feet net log scale (71,880,000 board feet net lumber recovery. Ex. 9, items 1(a) plus 2(b)).

(3) *Future Forest Service Timber.* Dahl Y. Kirkpatrick, Assistant Regional Forester in Charge of the Division of Timber Management of the United States, testified to the existence and availability of a future timber supply to Nagel and Duke City (R. 470-476).

The sales by the Forest Service are tailored to the needs of the individual mills and are made from the working circle which supplies the particular mill in question (R. 468-471). Kirkpatrick testified that the Chevelon work-

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**Overrun.* Experience has shown that the number of board feet of lumber as measured at the conclusion of the manufacturing process exceeds the number of board feet of the original timber as estimated in the forest on a net log scale. This difference is known as the "overrun".

In determining the amount of lumber to be sold in the future, it was necessary for the District Court to determine the net lumber recovery which could be expected from the timber available. This was accomplished by determining the probable percentage of overrun and then using this figure to convert the available timber measured on a net log scale basis into projected net lumber recovery.

The percentage of overrun used by the District Court in its computation of damages was 15%. This figure is shown by the evidence to be conservative and has not been disputed by appellants.

ing circle from which the Duke City Winslow mill is supplied is covered by a management plan, which constitutes a projection of timber to be cut from the working circle during a period of twenty years (R. 471-473). The timber is divided into sale blocks in sizes suited to Nagel and Duke City and the sales are timed to correspond with their needs (R. 470-471). Immediately prior to the trial, a 27 million board foot sale "keyed" for the Nagel mill was purchased by it without competition (R. 467). At the time of trial a sale "keyed" to the needs of Duke City had been announced and Nagel indicated that it was not going to bid thereon (R. 401, 468-469).

In describing the procedure as it now exists and in all probability will exist in the future, Mr. Kirkpatrick testified:

"Q. In other words, if we may translate that from the general to the precise situation, do you mean that if a Nagel contract was about to run out for timber—I'm speaking of prior to the Aztec deal—you would try to determine what should be sold and what its needs were and then notice it for sale with that in mind?

A. That's right, timing it so the sales were fitted in with the needs of the industry or purchasers we had.

Q. And the same prevailed with regard to—

A. That's right.

Q. —Gallagher, who was in the picture at the time?

A. That's very true.

Q. Now, will that same procedure be, in your opinion, followed in the future after this Aztec timber is cut out?

* * * * *

A. I would presume that the same course will be followed in the future. Our management plan that I referred to a while ago contemplates that we will sell the stated amount each year from the—that is we will secure the cutting of a stated amount each year from the working circle.

> Well, the only way to do that and to sustain the industry and the people that are dependent upon the industry is to keep the sales fitting on end to end, if you see what I mean." (R. 470-471).

Since 1942 in the Chevelon working circle the mill for whose needs each sale was tailored has acquired the timber offered in each particular sale (R. 466). Except for a small quantity of burned timber, all the Forest Service timber that has ever been sold from the Chevelon working circle has gone to the two mills in Winslow (R. 466, 495-496, 757-758). Liberman himself testified that future Forest Service sales were and are his intended source of future timber for the Winslow plant (R. 879, 938-939).

The present Management Plan of the Forest Service provides 21,000,000 feet of timber net log scale (24,150,000 board feet net lumber recovery) for cutting in the Chevelon working circle each year through 1968; and the allowable cut thereafter is 18,163,000 feet net log scale (20,887,000 board feet net lumber recovery) per year for the succeeding twenty years (R. 474-476).

From all of the evidence, the reasonable probabilities are apparent and were found by the District Court: The Forest Service will make available the amounts of timber reflected in the Management Plan; and one-half of this amount will be acquired by Duke City for its Winslow operation.

(c) PRODUCTION OF AVAILABLE TIMBER BY YEARS.

The District Court based its award of damages upon a total production of 266,565,000 board feet of lumber. The estimated production by years is set forth in Finding of Fact No. 19(f). The estimate is based upon a projected production of 30 million feet per year through 1963, at which time all the Aztec timber will

have been cut (Ex. 13). The estimated production is then accounted for by Forest Service timber based upon Government projections contained in the Management Plan.

(d) PROFIT PER THOUSAND BOARD FEET OF LUMBER.

The District Court applied two different figures representing profit per thousand board feet. One figure, $3.00 per thousand board feet, was applicable to the Aztec timber already owned by Duke City. The second figure, $4.71 per thousand board feet, applied to the balance of the timber comprised of Gallagher Aztec timber and Forest Service timber under contract and to be acquired in the future.

(1) *$3.00 per thousand from Milling Duke City Aztec.* The District Court found that the joint operation would have realized a profit of $3.00 per thousand for milling Duke City's 71,880,000 feet of Aztec timber—a total of $215,640.00. Nagel's one-half of this profit amounts to $107,820.00 and would have been derived in the years 1959 through 1963 in the amounts indicated in Finding of Fact No. 19(b) (R. 193). See page 12, supra.

(2) *$4.71 per thousand for Gallagher Aztec and Forest Service Timber.* The memorandum ruling filed by the District Court on July 28, 1961 (R. 196-200) shows in detail the manner in which the $4.71 figure was computed. The District Court found that Nagel's experience in its own mill from 1952 through 1959 was a sound basis for calculating the probable future profits. Plaintiffs' Exhibit 10 shows the manner in which Nagel's profit per thousand board feet before depreciation was computed. This figure furnishes the basis for an accurate estimate of the probable profit per thousand to be expected from the Duke City Winslow operation. It is based on Nagel's experience over an eight-year period in a similar and adjacent plant operating with the same source of timber

supply (R. 268, 417-419). It is corroborated and in fact shown to be conservative by Duke City's own estimate of future profits based upon its knowledge of Gallagher's performance in the years preceding the purchase (R. 68-69). It is further corroborated by Duke City's failure during the trial to produce its own books relative to the Winslow operation (R. 1100-1104). The similarity between the Nagel and the Duke City Winslow mills was confirmed by appellants in the District Court (R. 1043-1044).

The District Court determined that the total profit before depreciation realized by Nagel from 1952 through 1959 was $1,591,791.40 on a total lumber production of 140,956,000 board feet (Ex. 10). Before arriving at a net profit figure per thousand board feet, the District Court determined that certain additional deductions should be made. These are best set out in the District Court's own language contianed in the Memorandum Ruling of July 28, 1961:

> "As to the $4.71 per 1,000 board feet on the Gallagher Aztec and Forest Service timber, the court felt that the comparable operation of the Nagels during the years 1952-59 was a sound basis for estimating probable future profits of the joint operations of plaintiffs and defendants, had the contract not been breached. However, the court determined that the plaintiffs' claimed figure for profit before depreciatioin, that is, $1,591,791.40 (Plaintiffs' Exhibit No. 10) was too high and made the following deductions: (a) Deducted interest paid by Nagels in the 1952-59 period in the sum of approximately $72,000.00; (b) While some management expenses had been deducted in reaching the $1,591,791.40 figure, it was estimated that the management expenses of plaintiffs' and defendants' operations would be probably $5,000.00 per year higher and accordingly, $40,000.00 should be deducted to make the Nagel experience more nearly comparable; (c) The joint operation of plaintiffs and defendants would require working capital with the resulting interest cost thereon,

and defendants' estimate of $500,000.00 at a 6% rate would require an additional deduction of $240,000.00 for the 8-year period covered in Plaintiffs' Exhibit No. 10.

"The total of the deductions mentioned above, $352,-000.00, taken from the $1,591,791.40 left $1,239,791.40; and when this was divided by the Net Sales FBM of 140,956,000, the operating profit before depreciation was $8.80 per 1,000 board feet." (R. 197-198)

The District Court then determined that purchase costs must be deducted and that this could and should be done by way of depreciation before arriving at a final net profit per thousand. The depreciation figure was computed by adding to the entire $650,000 cost of the plant less the salvage value, the $301,353.00 replacements which would be necessary during the 15 year period (Ex. 11). It should be deducted from future profits by deducting depreciation in the amount of $3.57 per thousand board feet from the $8.80 figure set forth above.

Although a great deal of "risk and hazard" was already accounted for by using an eight year period in the past as a basis for estimating future profits, the District Court determined that a further deduction in this regard should be made. Again, referring to the Memorandum Ruling:

"Deducting from the anticipated profit before depreciation of $8.80 per 1,000 board feet, the depreciation of $3.57 per 1,000 board feet left a probable net profit of $5.23 per 1,000 board feet. However, since the calculation being made was of future profits and there is always uncertainty and chance in the future, the court determined to reduce the probable figure by 10% or 52¢. The result was a finding of a profit to plaintiffs and defendants, had the contract not been breached, of $4.71 per 1,000 board feet on the Gallagher Aztec and Forest Service timber." (R. 198)

(e) COMPUTATION OF PROFIT PER YEAR AND TOTAL PROFIT.

The District Court then computed the profit to be received in each of the years through 1973 by multiplying the applicable net profit per thousand by the amount of estimated production for each year, divided the net so calculated in half to represent the Nagel's share and then reduced the figure to present value. The resultant figure was $478,633.40.

Finally, this figure was reduced by the sum of $48,750 representing the present value of interest computed on the purchase price of $650,000 (Ex. 4). The net amount then remaining, $429,883.40, was held to be the net damage sustained by Nagel as a result of appellants' breach of contract.

3. Reply to Argument on Computation of Damages.

Appellants' Contentions Summarized

Appellants attack the method used by the District Court in computing appellees' damages in four respects:

By alleging that the trial court failed to deduct Nagel's cost of performance (Specification of Error No. 6; Br. 41);

By asserting that a net profit of $4.71 per thousand would not be possible in the future when production drops below 30,000,000 board feet per year (Specification of Error No. 8; Br. 61);

By taking into consideration timber not actually under contract (Specification of Error No. 8; Br. 56);

By projecting the profits for too long a period into the future (Specification of Error No. 8; Br. 60).

(a) THE DISTRICT COURT DEDUCTED NAGEL'S COST OF PERFORMANCE.

Appellants persist in arguing, as they did in the District Court, that no consideration was given to Nagel's cost of performance. The evidence, findings and comments of the District Court show

that Nagel's cost of performance was fully deducted from the profits awarded (R. 196-200; Finding 19; Ex. 11). Appellants use the term cost of performance when referring to Nagel's share of the purchase price (Br. 41-43). The entire purchase price (less salvage) plus replacements was deducted from profits by way of depreciation before damages were computed (Ex. 11).

Appellants are asking that the cost of Nagel's performance be charged twice. This would clearly be the result if both the depreciation and the purchase price were charged against profits (unless a counter-balancing credit for the amount accumulated by depreciation were also allowed which would simply have the effect of cancelling out the depreciation deducted). The District Court also deducted the entire amount of interest payable by Nagel on the purchase price and the interest chargeable to working capital.

The District Court carefully explained its method of computation to appellants as follows:

> "The Court: Is it your understanding I didn't deduct depreciation, which covers the cost of acquiring the plant?
>
> Mr. Enersen: No, your Honor.
>
> The Court: Well, I certainly did.
>
> Mr. Enersen: I do not contend you failed to deduct depreciation.
>
> The Court: Well, the cost of the acquisition is covered in the depreciation.
>
> Mr. Enersen: This, I believe, is an erroneous assumption on the part of the Court. It is true that after a person makes an investment in a business, has his capital tied up in a business he can through depreciation over a period of time recover, piecemeal, the amount of the investment, assuming that the profits are sufficient to pay the depreciation and the cash position of the business is such that the depreciation

can be withdrawn from the business and paid to the proprietor. But in order to get the depreciation the investor must put the money into the business in the first place.

The Court: If he puts the money in and you charge it out by way of depreciation, if you are to charge him for the investment and depreciation you take it twice. It is only invested once, and when you take it out by way of depreciation you have liquidated your investment, charged it to depreciation." (R. 55-56)

(b) $4.71 PROFIT PER THOUSAND IS PROPER FOR ENTIRE PERIOD.

We agree that a reduction in the amount of timber available will reduce the total profit of any operator. It does not necessarily follow that the profit per unit of production will be reduced; the evidence fully supports the finding that the same profit per thousand will be realized even after the production drops below 30,000,000 feet per year. Jenkins testified that the profit per thousand to be realized from the Duke City Winslow mill from a production of 10,000,000 to 12,000,000 feet per year would be the same as that realized from the production of 30,000,000 feet per year (R. 1403). He based this testimony upon his knowledge of both the Nagel and Duke City Winslow plants and upon the records and evidence produced during the trial (R. 1402-1403). He testified that the Nagel mill had realized a substantial profit per thousand when operating in the past on 10,000,000 to 12,000,000 feet per year (R. 1403). His statement is corroborated by Exhibit 10. He carefully explained the relatively minor changes that would have to be made to convert the Duke City Winslow mill to a production of 10,000,000 to 12,000,000 feet per year, principally a reduction from a double to a single shift (R. 1406).

Substantial evidence supports the trial court's conclusion that the $4.71 profit figure would be applicable during the entire period.

(c) DISTRICT COURT PROPERLY CONSIDERED FUTURE FOREST SERVICE TIMBER.

Appellants urge that any award of future profits must be limited to timber actually under contract and that timber which will be cut under contracts awarded by the Forest Service in the future must be disregarded (Br. 56). The evidence refuting this contention has heretofore been discussed at pages 43-45, supra, and clearly shows there can be little doubt that timber from the Sitgreaves National Forest will be available in perpetuity.

Appellants elicited testimony and rely on it (Br. 57), which appellees do not dispute, that no one can "guarantee" success in bidding on timber sales, and that no one can "guarantee" that the Sitgreaves National Forest will not be destroyed by fire or pestilence. Appellants' insistence upon the word "guarantee" indicates their misconception of the legal principles involved. The Arizona Supreme Court in *Martin v. LaFon,* supra, allowed recovery for loss of future profits arising from the breach of an option to acquire the operating rights to the Jefferson Hotel in Phoenix. Certainly in that case plaintiff could not "guarantee" future profits, nor freedom from fire, nor that a new Hilton hotel would not be erected across the street from the Jefferson. But a "guarantee" of future profits was not required. "The test is whether such evidence is sufficient to show with reasonable certainty what the future profits would have been" (100 P.2d at 184).

Proof of lost profits need not be such as to put the issue beyond doubt. The proof is sufficient if a basis for a fair and reasonable estimate is afforded. This rule was stated in *Anvil Mining Co. v. Humble,* supra, and has been consistently followed.

The applicable principle was concisely stated in *Connecticut Ry. & Lighting Co. v. Palmer,* supra (109 F.2d at 571):

> "* * * In cases where recovery of prospective damages on breach of contract is demanded, the plaintiff is not called on to prove to a dead certainty that he will suffer a loss

from the defendant's wrong. Reasonable expectation of loss is all that can generally be proved. * * *"

Courts have been confronted with claims for loss of future profits and have allowed recovery in types of endeavor far more hazardous and uncertain than the lumber industry.

A claim for loss of future profits based on breach of a contract to dig an oil well was allowed this Court in *Julian Petroleum Corporation v. Courtney Petroleum Co.,* supra. In disposing of the defense of uncertainty, this Court stated (22 F.2d at 362-363):

> "No doubt there are elements of uncertainty in this case, such as the fact of production, the amount of production, its duration, the value of the oil, and perhaps in other respects; but the testimony offered was the best obtainable, and we think that under the authorities its weight was for the jury."

Salmon fishing in Oregon's Tillamook Bay was the subject of controversy in *Blanchard v. Makinster* (Ore. 1931), 137 Or. 58, 1 P.2d 583. In allowing recovery for loss of future profits, the Oregon Supreme Court stated the problem and its controlling principle as clearly and succinctly as in any reported case (1 P.2d at 586):

> "* * * Doubtless it is true as the defendants contend, that a commercial fisherman is confronted with many hazards over which he can exercise no control; for instance, the tides, the weather, market conditions, the number of other fishermen operating in the same locality, and so forth. But no business is free from uncertainties, and if the courts are to search only for the hazards which might deprive a particular venture, whose course is interrupted by a tortious defendant, of its profits, no injured plaintiff can ever recover just relief for the damage sustained. * * *"

Appellants make repeated reference to *Peters v. Lines* (CA 9, 1960), 275 F.2d 919, as authority for the argument that only timber actually under contract can be considered. There is the difference of night and day between the proof of future damages in *Peters* and in the instant case.

The profits awarded by the District Court here are clearly based on evidence. In *Peters,* a portion of the award resulted from a mathematical error. Other portions were either not supported by the evidence (as in regard to the disruption of the bankrupts' woods operation) or were contrary to the evidence (as in regard to the loss of truck earnings). Furthermore, in regard to future damages, this Court held (275 F.2d at 931):

> "* * * Irrespective, however, of such error, the evidence is insufficient to justify such award. The maximum timber in the Redwood Creek Ranch area owned by the bankrupt at the time of the breach by appellants was 200 million board feet. *No evidence was received that bankrupt* had in the form of options or otherwise acquired or *could have acquired additional timber* in the Redwood Creek Ranch area. Furthermore, the evidence is clear that only about 40 per cent of the remaining timber owned by bankrupt would be deliverable or delivered to the appellants. Such factors were not reflected in the computations apparently made by the referee. The result is that here again the award is speculative and hypothetical." (Emphasis supplied.)

Here Nagel produced its Certified Public Accountant's reports for the period from 1952 through 1959 (Ex. 7A-7I). There is no contention that they are incorrect. The calculations of profit were made on precise evidence. The timber stands and their availability were fully certified by the records and by the testimony of Dahl Kirkpatrick. The probability of profit was proved by the opinion of a highly qualified expert. The conclusions of the referee in *Peters* were the results of generalized estimations, assumptions, and predictions not supported by the books of the bankrupt or the evidence.

Even Liberman's testimony recognizes that future Forest Service timber should be considered. He testified that as of September 1958 "my understanding is that in that circle there is available about 9 to 10 million feet per year" not forever but for ten or fifteen years in any event (R. 1694, 1708). His figures, when allowance is made for a 15% overrun, are well within the bounds of production which the District Court took into consideration in computing damages. See Finding 19(f). He also testified that during the first seven years, after using up the Aztec timber and the timber under existing Forest Service contracts, he would get timber from sales to be made by the Forest Service (R. 879-880). Finding 19(f) shows that in 1960 appellants would begin using timber from new Forest Service sales.

(d) FUTURE PROFITS PROPERLY PROJECTED FOR FIFTEEN YEARS.

How many years into the future should loss of profits be projected? Appellants have complained that the fifteen year period used by the District Court is too long (Br. 60). They have offered no alternative period of time, except to say that profits should be limited to timber under contract (Br. 56). It must be conceded that any choice of a given number of years involves some degree of arbitrary decision. In *Connecticut Ry. & Lighting Co. v. Palmer,* supra, in considering the problem of how many years forward profits should be projected, the Court pointed out (109 F.2d at 571):

> "* * * Any selection may seem somewhat arbitrary; whatever the number of years taken, a critic may ask why one year less or one year more was not taken. Obviously the predictable period varies in particular cases according to the stability of the business and other elements. * * *"

The fifteen year period fixed by the District Court was not a hypothetical figure; it is amply supported by the evidence.

In the light of all the evidence produced, it is a conservative figure.

Kenneth Smith testified that subject to the contingency of fire or a drastic change in the policy of the United States, Forest Service timber will be available to the Duke City Winslow mill in perpetuity (R. 637). Smith further testified that Nagel could expect to make as much per thousand feet over the period ending in 1973 as it has in the past and that this is a "very conservative opinion" (R. 646). The testimony of Dahl Kirkpatrick establishes that the present Management Plan for the Chevelon working circle extends beyond 1973 (R. 474-475).

The evidence and realities fully support the finding of a future timber supply and that Duke City will purchase, manufacture and sell at a profit its share of this timber for a period of time far beyond fifteen years. When considered in the light of the controlling principles of law, which require the amount of future profits to be established only to a reasonable degree of certainty, the projection of fifteen years is most conservative.

Appellants cite *Hawkinson v. Johnston,* supra, in support of their contention that a period of fifteen years is too long. This case is authority for just the contrary. The period for future damages adopted by the District Court was ten years. The Circuit Court held that, based upon all the evidence, including past history, present conditions and expert testimony, the judgment of the District Court was warranted. The language of the Circuit Court in *Hawkinson,* however, is persuasive authority for upholding the District Court's selection of a fifteen year period in the instant case (122 F.2d at 731):

> "It will of course generally be argued in a case of this character, as it is here, that any period of definite forecast or certain predictability attempted to be fixed by the trial court is arbitrary and excessive. But the rule for determining

the damages in such a situation is no different than in any other case. The damages are not speculative merely because they cannot be computed with mathematical exactness, if under the evidence they are capable of reasonable approximation. Obviously there is not, nor can there be a fixed, uniform period for which damages should be allowed in every case of total breach of a long term lease, but the period for which the damages can be reasonably forecast or soundly predicted in such a situation must depend upon the circumstances and evidence of the particular case. Thus, in Palmer v. Connecticut Railway & Lighting Co., 311 U.S. 544, 61 S. Ct. 379, 85 L.Ed. 336, damages were allowed in a bankruptcy proceeding, on an unexpired term of 969 years, for an eleven year period, three of which had already passed at the time of trial.

"The Missouri courts have recognized that 'The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result, but uncertain in amount.'

"This is the same test that was applied in Palmer v. Connecticut Railway & Lighting Co., supra, page 561 of 311 U.S., page 385 of 61 S.Ct., 85 L.Ed. 336, where the court said: 'Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion. The certainty of the evidence as to damages for rejection of a lease depends upon the same tests as in other situations where damages are difficult of proof.'

"Plaintiff argues on his cross-appeal that, under the testimony of the expert witnesses which he produced, and to which defendant offered no opposing experts, the court should have fixed the predictable damage period at not

> less than fifteen years. But the trial court was not required to accept at face value the opinion of the expert witnesses as to future rental returns and tax valuations. The weight to be given purely opinion evidence is always a matter for the appraisal and judgment of the trial court or jury, in the light of all the circumstances of the particular situation." (122 F.2d at 731)

Appellants' entire argument on damages ignores the fact that the necessity of undertaking the admittedly difficult task of estimating future damages was caused by appellants' wrongdoing, not appellees'. As stated in the *Connecticut Ry.* case, supra (311 U.S. at 385):

> "* * * The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for non-existent certainty. * * *"

CONCLUSION

The many adjectives used to characterize the Court's rulings on various points would lead one to believe that the case was hurriedly tried or hurriedly decided without adequate consideration by the trial court. The exact contrary is true.

The presentation of evidence required eight days, during which a daily transcript was furnished the court and counsel on both sides. Exhaustive briefs were prepared, submitted and considered and the post-trial motions were orally argued at length and likewise considered.

If the trial had been to a jury the language used might be more understandable, but even then it would not have been justified under the evidence. Much less is it so when one considers that the case was tried to the court by an extremely able and respected trial judge. His award was not "swollen", he did not "ignore or sweep aside" the business realities of the transaction, he did not view the parties' conduct as occurring in a "never-

never land" (Br. 2); he did not base his award on any "novel theory" (Br. 6) nor on any "magic" (Br. 2); he did not "disregard the evidence and the law" (Br. 7); he did not attempt to "surmount" any obstacle (Br. 23); he did not employ a "creative effort" to make an agreement where none existed (Br 29); he did not "penalize" appellants (Br. 30); he was not "swept up" by anything nor "lose sight" of the basic questions in issue, nor did he succumb to any "mumbo jumbo" (Br. 32); he did not find any "astronomic" values (Br. 33); his award was not "grotesque" (Br. 36); his decision was not "absurd" (Br. 40); he did not go "astray" in any manner (Br. 41); he made no "purported" adjustment nor became involved in a "tangled computation" in which he outwardly based his award (Br. 41); he committed no "glaring error" (Br. 42); his computation was not "complicated" (Br. 56).

There is no merit to the appeal. The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF CONFORMANCE

I hereby certify that I have examined the provisions of Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the above-tendered brief conforms to all of the requirements of said Rules 18 and 19.

ELIAS M. ROMLEY